IN THE

Supreme Court of the United States

October Term, 1977

No. 77-521

GENERAL MOTORS CORPORATION, PETITIONER,

v.

UNITED STATES OF AMERICA, et al.

Brief of Volkswagenwerk, AG and Volkswagen of America, Inc. in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Introduction and Statement of Interest of *Amicus Curiae*

This brief, filed pursuant to written consents obtained from the parties as required by Rule 42 of this Court, is submitted by Volkswagenwerk, AG ("VWAG") and Volkswagen of America, Inc. ("VWoA") as *Amicus Curiae* in general support of petitioner, General Motors Corporation.

VWAG, a corporation organized and existing under the laws of the Federal Republic of Germany, is the manufacturer of Volkswagen vehicles. VWoA, a New Jersey corporation, is the authorized importer of Volkswagen vehicles into the United States. Numerous Volkswagen automobiles, both new and old, are owned and used in the United States.

Both VWAG and VWoA (sometimes collectively referred to herein as "Volkswagen") have a real and vital

interest in filing a brief *amicus curiae* in opposition to the decision below. That decision applies and construes key provisions of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 *et seq.* (1970) (amended 1974) (hereinafter "the Safety Act"), as well as evidentiary considerations related to such provisions. As a manufacturer of motor vehicles subject to the Safety Act, VWAG is vitally affected by judicial pronouncements regarding the scope and breadth of the Act and enforcement thereof.

Despite more than a decade of Safety Act operation, this Court has, apparently, on only one occasion reviewed the Act's enforcement[1] and upon issues different from those presented herein. The non-unanimous decision below involves statutory construction of critical definitions of "defect," "motor vehicle safety" and "unreasonable risks" which lie at the heart of Safety Act enforcement. Curiously, the decision below includes a lengthy dissenting opinion which the "per curiam" majority professes to agree "with much of."[2] Yet the areas of agreement remain unidentified. Moreover, the dissenting opinion, characterized as "scholarly" by the majority, attempts to suggest guidelines for the trial of cases likely to affect numerous litigants who are not party to the instant case:

> "[T]he import of my disagreement with the majority has more to do with the doctrine we establish for governance of this type of case in the future than the result in the case of the 1959-1960 Cadillacs." [3]

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[1] *Ford Motor Co.* v. *Coleman*, 402 F.Supp. 475 (D.D.C. 1975), *aff'd mem.*, 425 U.S. 927 (1976).

[2] Judge Leventhal, who authored the dissent below was also author of the Circuit Court's opinion in *United States* v. *General Motors Corp.*, 518 F.2d 420 (D.C. Cir. 1975) (Wheels) as well as the majority opinion in *Ford Motor Co.* v. *Coleman*, *supra* n. 1.

[3] Decision below, *United States* v. *General Motors*, 561 F.2d 923, 938 (D.C. Cir. 1977) (dissenting opinion).

Thus, it is evident that manufacturers other than General Motors are materially affected by the nature of the precedent developed below. Even the dissent's elaborate consideration of guidelines for adjudication in such cases merits review. It is at least arguable that neither the majority nor the dissent correctly construe and apply the relevant statutory provisions. It remains for this Court to resolve a real conflict and set forth criteria which enable litgation under the Act to proceed in a fair and constitutionally appropriate manner.

For Volkswagen and other manufacturers it is evident that clarification is needed in this undefined area. Manufacturers need to know in advance what legal standards and evidentiary criteria will be applied to "defect" inquiries so that they can make reasoned decisions whether litigation is necessary. At the same time, the Agency needs to have appropriate guidelines so that frivolous, marginal, costly and time-consuming litigation or administrative "over-zealousness" can be minimized. The trial and appellate courts need guidance on how to balance the competing interests and assure due process within the statutory framework.

The decision below does not clarify; it confuses. It suggests that a conflicting trial record, replete with reasoned technical testimony by competent experts and which raises material issues of fact, can be ignored in favor of summary judgment. It undercuts the legislative intent that there be an actual trial *de novo* rather than a cursory overview, via motion practice, of an informal administrative record. It conflicts with the statutory policy that there be a full, fair, adversarial proceeding rather than a summary judicial disposition upon only selected facts.

Perhaps more importantly, the opinion below creates an unhealthy climate of uncertainty and the potential for

Agency intimidation or "overzealousness" in an area which requires a rational balancing of many complex variables and competing interests. Manufacturers do not know what key definitional provisions mean and lawyers cannot advise their clients with confidence as to a predictable outcome. Accordingly, Volkswagen submits this brief as *amicus curiae* to urge this Court to accept review of this matter for the purpose of dissipating the confusion engendered by the decision below and to consider all policy ramifications bearing upon the issues.

ARGUMENT

I.

The "Safety Related Defect" and "Unreasonable Risk" Issues in The Context of Traffic Accident Causation and Injury Minimization Are Complex and Ordinarily Not Susceptible To Summary Determinations.

The question of causation of traffic accidents and resulting injuries and fatalities involves complex, interrelating variables often operative, sometimes in subtle ways. One thing is clear. The general cause of traffic-related injuries cannot be laid solely at the automobile manufacturer's door step.

An automobile operated under given circumstances is, by its nature, a product whose use the manufacturer cannot control. The drivers alone determine the speeds at which their cars will travel, the turns to be made, the proximity to other cars or objects on the roadway, the perception time required for emergency response, etc. Once the vehicle is being driven, its safe operation is almost entirely dependent upon the driver's behavior and that of others around him. Experience indicates that the capability for entirely independent action by a driver—the very functional feature which makes automobiles so indispensable to a modern economy—is also a primary cause of considerable tragedy.

> "It is obvious, of course, that automobiles are unhappily and almost continuously colliding with other motor vehicles, with trees, with culverts, with locomotives, and with every imaginable type object, either moving or fixed; that they are, indeed, driven off bridges, driven into water, and driven over cliffs. They are, in fact, involved in collisions of limitless variety." *Yetter* v. *Rajeski,* 364 F.Supp. 105, 108 (D.N.J. 1973).

Nearly every accident situation involving an automobile, "no matter how bizarre" is foreseeable "if only because in the last fifty years drivers have discovered just about every conceivable way of wrecking an automobile." *Dreisonstok* v. *Volkswagenwerk, A.G.,* 489 F.2d 1066, 1970 (4th Cir. 1974). Given the limitless variety of conditions under which automobile accidents occur, in terms of, for example, impact speed, direction and location of impact, accident severity, etc., it simply is not fair in "defect" cases to eliminate from the fact-finder's consideration appropriate evidence on all factors related to accident or injury causation.

The results of a recently published study on the causes of automobile accidents conducted for the U.S. Department of Transportation by Indiana University's Institute for Research in Public Safety [4] are instructive. The multi-

[4] Final Report, *Tri-level Study of the Causes of Traffic Accidents,* Volume I—Research Findings, Report No. DOT HS—801 334 (January 1975) (hereinafter called "Indiana Study").

disciplinary accident investigation group[5] evaluated accidents to determine whether they were caused by human factors, environmental factors, or vehicle factors. It was found that human factors acting alone were the predominant cause of accidents.[6] Human and environmental factors in combination generally ranked second.[7] Vehicular factors were identified as the lowest cause of accidents.[8] The results of the study "underscore the overwhelming influence of human factors in automobile accident causation. Even where vehicular and environmental factors are causally involved, it is generally in combination with a human failure."[9] The study also states:

> "Accidents caused by manufacturing defects and catastrophic mechanical failures have been found to be very infrequent occurrences. The top-ranking vehicle factors * * * generally resulted from improper maintenance."[10]

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[5] "Multidisciplinary" accident research refers to a systematic aproach to intensive accident investigation wherein the participant investigators come from different disciplines so as to permit in-depth expert evaluation of accident causes. In the Indiana Study the members of the "in-depth" team included a sociologist, a traffic engineer, a reconstruction specialist, an automotive engineer, a mechanic, and an engineering assistant/technical writer. Indiana Study, at p. 7.

[6] Indiana Study, at p. 19. Examples of human factors are dozing, blacking out, recognition errors, decision errors, improper driving, etc. Id. at pp. 26-27.

[7] Indiana Study, at p. 19. Examples of environmental factors are slick roads, inadequate signs and signals, view obstructions, highway design problems, highway maintenance problems, weather changes, etc. Id. at pp. 27-28.

[8] Indiana Study, at p. 44. Vehicular factors include tires and wheels, brake system, steering system, suspension problems, power train and exhaust, communications system, etc. Id. at p. 28.

[9] Indiana Study, at p. 24. It should be noted that even in the category denominated as "vehicular factors" there exists the potential for a significant human element. Thus, for example, such systems as brakes and tires require inspection and maintenance by the user in order to assure proper performance.

[10] Indiana Study, at p. 51. Of course, failure of a product user to maintain the product, where such lack of maintenance causes or contributes to causing the injurious event, is a form of human fault.

In its summary, the Government's own Indiana Study articulates the need to properly educate drivers, the principal cause of automobile accidents.[11]

The Government's own annual report on the administration of the Safety Act noted that in 1974 fatalities decreased in one year by over 16 percent "as a result of the energy crisis of late 1973, and the consequent imposition of a national maximum speed limit of 55 miles per hour . . ."[12]

It is, of course, a matter of common knowledge that alcohol impairment and other human factors play a most significant role in accident causation and collision severity. In the Government's own words,

> "Many factors contribute to the occurrence and seriousness of motor vehicle accidents. They operate in complex ways that make it difficult to determine the beneficial effect of a specific safety program or

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[11] Indiana Study, at p. 52:

> "These results indicate that we must ensure that drivers always look for traffic when entering intersections, and do so carefully enough that they will accurately detect oncoming traffic. We must ensure that drivers monitor traffic ahead at a rate sufficient to ensure that sudden stops do not result in collision, and must also ensure that drivers monitor road signs and signals at an adequate rate. Finally, we must enable drivers to recognize the safe maximum travel speed for various road configurations, and induce them to be unwilling to accept the risk of traveling faster. In summary, we must ensure that drivers are aware of the danger cues in the driving environment, and can acquire and recognize these amidst all of the other information that is continually bombarding the driver."

[12] U.S. Dep't of Transportation, *Traffic Safety '76: A Report by the President On the Administration of the National Traffic & Motor Vehicle Safety Act of 1966, As Amended*, p. 1 (Jan. 1, 1976—Dec. 31, 1976). The report noted that "approximately 50 percent of the 9,000 lives saved annually may be attributed to a continuation of the 55-mph national maximum speed limit." Id. at p. 1. The report quoted the observation of the President of the United States, "It is difficult to escape the obvious conclusion that the Nation's highways are safer now than they were when the speed limit was higher." *Ibid.*

device initiated by the NHTSA to reduce fatalities and injuries.'"[13]

Against the backdrop of these complex, interrelating variables, many of them not within the control of automobile manufacturers, it is inappropriate to sanction "defect" determinations, often involving older cars, in a summary, *per se* fashion as the court below did.

Both the majority and dissenting opinions emphasized as influential factors statistical "evidence" concerning "other accidents." While other occurrences may be relevant to the inquiry, they need not in a given case be determinative. Other accidents or occurrences may only be arguably suggestive of mechanical problems. The only fair way to determine the significance of this kind of proof, if any, is to establish by competent, probative evidence in a fully litigated trial whether such occurrences are relevant and, if so, the weight to be attached to them in the context of other relevant considerations. The summary, presumptive approach taken by both the majority and dissenting judges is too restrictive in light of what is known about the complexity of accident causation. If a "statistical game" is to be the central focus of a *de novo* "defect" trial, then each and every occurrence that makes up the statistical base has to be scrutinized for the proper foundation, accuracy of underlying information and probative effect.

When a factual dispute is presented via legitimate, qualified expert testimony as to the underlying statistics and their significance, as well as the scientific and engineering questions of "defectiveness" or "unreasonable risks," the matter is plainly inappropriate for summary adjudication. The whole premise of trial *de novo* is a full and fair

[13] U.S. Dep't of Transportation, Traffic Safety '76, *supra* n. 12, at 2.

opportunity to litigate the issues before an impartial fact finder in accordance with due process. The majority below swept away the legitimate factual conflict and substituted its own notion of "unreasonable risk." The dissent, though more sensitive to the statutory mandate for a full trial, also indulged in structuring "presumptions" and "burdens of proof" which could, in future cases, inhibit the manufacturer's ability to litigate fully and fairly the "defect" and "unreasonable risk" issues.

If so significant and sweeping a gloss is to be placed upon key provisions of the Safety Act, it should be effected by this Court only after consideration of all the competing policy ramifications and following the submission of full briefs by the litigants and interested parties.

II.

"Safety Related Defect" Litigation Under The Act Will Have Enormous and Potentially Irreparable Products Liability Implications in Private Civil Suits, A Factor Mandating that "Defect" Determinations Be Based Upon A Full, Fair and Impartial Trial *De Novo* Rather Than Summary Judgments.

Private civil litigation involving injuries attributable to use of products, commonly known as "products liability," has mushroomed.[14] The Interagency Task Force on Product Liability (hereinafter "Task Force"),[15] chaired by the

[14] See generally, Hoenig, *Products Liability Problems and Proposed Reforms,* Insurance L.J., No. 651, p. 213 (April 1977).

[15] The Task Force was established in April 1976 by the President's Economic Policy Board to conduct a study of the impact of products liability claims on the economy. Aside from the Commerce Department, participants included other Government agencies. The Department of Justice provided assistance.

Under Secretary of Commerce, found that the "rate of increase in products liability claims appears to have been rising in excess of the rate of increase in actual product injuries."[16] The Task Force found that products liability law has become "filled with uncertainties creating a lottery for both insurance rate makers and injured parties."[17] Amid the mushrooming case load are reports of astronomical verdicts and settlements, even in the million dollar category and beyond.[18]

The automobile industry has been inundated with products liability litigation involving the extensive use of automobiles upon the Nation's highways. Such suits range from claims that defects allegedly caused accidents to claims that defects failed to minimize injuries in accidents caused by others. Suits have involved claims, for example, that small cars were not "crashworthy" when impacted by moving railroad trains;[19] that cars are defective because they can be driven into others too fast;[20] that a bell or alarm should have been installed in a four-year-old car to warn the driver when his brake fluid leaked;[21] that an ignition

[16] Interagency Task Force on Product Liability, *Briefing Report (Executive Summary)*, at p.ii (Jan. 1, 1977) (hereinafter "Task Force Report").

[17] Task Force Report, *supra* n. 16, at p. iii.

[18] See Hoenig, *supra* n. 14, Insurance L.J., No. 651, at pp. 226-230.

[19] *E.g., Alexander* v. *Seaboard Air Line R.R.*, 346 F.Supp. 320 (W.D. N.C. 1971), *aff'd*, CCH Products Liability Reports ¶ 6748 (4th Cir. 1972) (collision with 114-ton locomotive engine); *Li Puma* v. *County of Rockland*, 81 Misc.2d 988, 367 N.Y.S.2d 149 (Sup.Ct. 1975) (collision of 4,000-ton freight train with school bus); *Walz* v. *Erie-Lackawanna R.R.*, CCH Products Liability Reports ¶ 5722 (N.D. Ind. 1967).

[20] *E.g., Schemel* v. *General Motors Corp.*, 384 F. 2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968).

[21] *McNally* v. *Chrysler Motors Corp.*, 55 Misc.2d 128, 284 N.Y.S.2d 761 (Sup.Ct. 1967).

lock in a 1961 model automobile was defective because a drunken thief stole the car by picking the lock and drove into the side of another vehicle, injuring its occupants;[22] that a car was defective because it injured a pedestrian when it crashed into him at 25 miles-per-hour, even though the plaintiff caused the accident by crossing the street directly in front of the approaching car;[23] that a luggage rack or parcel grid located in front of the saddle of a motorcycle made the product defective because the rider was injured when he was launched forward during his collision with a car and thereby impacted the rack;[24] that an obviously unpadded dashboard on an old car was defective because it should have been padded;[25] and that a snub-nosed van vehicle was "uncrashworthy" and defective because it was not built like a standard passenger car.[26]

The potential for labelling virtually anything an alleged "defect" requires assurance that a full and fair opportunity to defend such a claim is guaranteed.

The broad ambit of suits alleging defects which cause accidents and those which allegedly enhance injuries when accidents occur coincides generally with the subject matter jurisdiction entrusted to the Administrator under the

[22] *Dean* v. *General Motors Corp.*, 301 F.Supp. 187 (E.D. La. 1969).

[23] *Baker* v. *Chrysler Corp.*, 55 Cal.App.3d 710, 127 Cal. Rptr. 745 (1976). It was not claimed that a defect in the car caused the accident, but that the pedestrian's injuries were increased during the impact because of the vehicle's design.

[24] *Bolm* v. *Triumph Corp.*, 33 N.Y.2d 151, 350 N.Y.S.2d 644, 305 N.E.2d 769 (1973).

[25] *Burkhard* v. *Short*, 28 Ohio App.2d 141, 275 N.E.2d 632 (1971).

[26] *Dreisonstok* v. *Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974).

Safety Act.[27] Thus, enforcement activities under the Act, including findings of "safety related defects" can generate the filing of innumerable claims as well as affect the course and outcome of such lawsuits.

Recently, courts have held that defect notification letters or recall notices issued by a manufacturer under the Safety Act are admissible in products liability suits. *E.g.*, *Fields* v. *Volkswagen of America, Inc.*, 555 P.2d 48 (Okla. Sup. Ct. 1976); *Barry* v. *Manglass*, 55 A.D. 2d 1, 389 N.Y.S. 2d 870 (2d Dep't 1976); *Manieri* v. *Volkswagenwerk, A.G.*, CCH Products Liability Reports ¶ 8006 (N.J. App. Div. 1977); *Farner* v. *Paccar, Inc.*, CCH Products Liability Reports ¶ 8015 (8th Cir. 1977). In such cases the notice is sometimes viewed as tantamount to an admission of product "defectiveness." Because, however, the manufacturer is compelled by the Safety Act to send these letters, with which it and numerous engineering experts may disagree, and because the language contained in such notices must refer to the existence of a "defect," admissibility of such a notification in a products liability suit will obviously impair the ability of a manufacturer to defend such a claim. Since verdict potential in a single, given case can be very high,[28] and since claims attributable to a particular car model can be numerous, the potential exposure to a manufacturer of a "safety related defect" finding can be astronomical. This would be in addition to the recall expense and penalty, if any, deriving from Safety Act enforcement.

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[27] See *e.g.*, 15 U.S.C. § 1391(1) (protection "against unreasonable risk of accidents occurring" and "against unreasonable risk of death or injury to persons in the event accidents do occur").

[28] *E.g.*, *Huddell* v. *Levin*, 537 F.2d 726 (3d Cir. 1976) (reversing two million dollar verdict in death claim for legal errors).

The finding of a "safety related defect," either by the Agency or by a court, will potentially have a kind of *de facto* "collateral estoppel" effect upon numerous products liability lawsuits. It will also generate the filing of numerous claims. Thus, it will be seen that the importance of "defect" litigation under the Safety Act transcends the particular policy considerations of the Act itself. At stake are due process ramifications in countless lawsuits all over the country.

In the face of this potential for irreparable injury, a manufacturer must be assured that its trial *de novo* rights under the Safety Act are fully preserved and that summary determinations are not made when a legitimate factual and technical conflict exists over whether there is a "defect" and whether it presents an "unreasonable risk." Such "defect" litigation has vast precedential effect and it is wholly inappropriate to have determinations made on a *per se*, presumptive or summary basis.

The significance of this question to manufacturers; lawyers who must advise their clients; trial and appellate judges who must decide such cases; the Agency; and consumers is so paramount that only full review by this Court will suffice to dispel uncertainty.

Conclusion

For the foregoing reasons, Volkswagen submits that a writ of certiorari should issue in this case and that full review of the policy considerations be undertaken upon full briefs by the litigants and interested parties.

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Respectfully submitted,

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